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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1741

ROY TIBBALS WILSON, CHARLES E. LAKIN, FLORENCE LAKIN, HAROLD JACKSON, DARRELL L., HAROLD, HAROLD M. and LUEA SORENSON,

Petitioners,

No. 79-1744

RGP, INCORPORATED, OTIS PETERSON, and TRAVELERS INSURANCE COMPANY,

Petitioners,

No. 79-1779

STATE OF IOWA AND STATE CONSERVATION COMMISSION OF THE STATE OF IOWA,

Petitioners,

GORDON DAHL and 81 OTHER FARM OWNERS IN MONTANA COUNTY AS AMICI CURIAE

THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE

v.

OMAHA INDIAN TRIBE and UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR THE OMAHA INDIAN TRIBE IN OPPOSITION

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OPINIONS BELOW

The Court decided *Wilson, et al.* v. *Omaha Indian Tribe* [No. 78-160, No. 78-161 on June 20, 1979, 442 U.S. 653 (1979)], and remanded the case to the United States Court of Appeals for the Eighth Circuit on a limited issue.

The Court of Appeals, on remand, rendered its Opinion on January 15, 1980, *Omaha Indian Tribe* v. *Wilson, et al.*, 614 F.2d 1153 (CA 8, 1980).

On April 11, 1978, the Court of Appeals rendered its earlier Opinion, *Omaha Indian Tribe* v. *Wilson, et al.*, 575 F.2d 620 (CA 8, 1978). By that Opinion, the United States Court of Appeals for the Eighth Circuit reversed the opinion, findings of fact and conclusions of law of the United States District Court for the Northern District of Iowa, Western Division, *United States* v. *Wilson, et al.*, 433 F.Supp. 57 (U.S.D.C. N.D. W.D. 1977).

References in this Brief in Opposition are made to:

1. *Wilson, et al.*, v. *Omaha Indian Tribe*, 442 U.S. 653 (1979), and to *Omaha Indian Tribe* v. *Wilson, et al.*, 614 F.2d 1153 (CA 8, 1980), in Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, as App. at Pet., Wilson, *et al.*, No. 79-1741, and page number.
2. *Omaha Indian Tribe* v. *Wilson, et al.*, 575 F.2d 620 (CA 8, 1978), in Appendix to Petition for a Writ of Certiorari, to the United States Court of Appeals for the Eighth Circuit, as App. to Pet., Wilson, *et al.*, *No. 78-160*, and the page number.
3. Appendix on Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, No. *78-160*, Wilson, *et al.*; No. *78-161*, Iowa, *et al.*, as App. on Writ of Certiorari, No. *78-160*, Wilson, *et al.*, No. *78-161*, Iowa, *et al.*, and the page number.

JURISDICTION

The Opinion of the United States Court of Appeals for the Eighth Circuit was rendered January 15, 1980. Petitions for Rehearing and Petitions *en banc* were denied February 8, 1980. Timely Petitions for Writs of Certiorari were filed. The Court's jurisdiction has been invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court's Opinion of June 20, 1979, *Wilson, et al.* v. *Omaha Indian Tribe*, remanding a single limited issue to the Court of Appeals, was modified by the Court's subsequent Order of June 25, 1979, granting to Petitioners RGP, Inc., *et al.*, No. 79-1744, a writ of certiorari, requiring, as contended for by the Petitioners, that the Court of Appeals review and pass upon the constitutionality of 25 U.S.C. 194, in addition to the limited issue remanded to the Court by its Opinion of June 20, 1979.

2. Whether the Opinion of the Court of Appeals was in conformity with the mandate of the Court when it limited its Opinion to a consideration of ". . . whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case" or, additionally, should the Court of Appeals have considered the issue of the constitutionality of 25 U.S.C. 194 [App. to Pet., Wilson, *et al.*, No. 79-1741, p. 28; Wilson v. Omaha, 442 U.S. 653, 679 (1979)].

3. Whether the Court and the Court of Appeals have construed 25 U.S.C. 194 in a manner which creates an unconstitutionally irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution.

4. Whether the construction by the Court of Appeals of 25 U.S.C. 194 creates a burden of proof greater than a preponderance of the evidence, thus depriving the Petitioners of their property without due process.

5. Whether 25 U.S.C. 194 is "on its face" unconstitutional.

6. Whether the Court of Appeals erred in declaring "clearly erroneous" crucial findings of fact of the District Court by reason of the evidence offered in support of those findings being purely speculative and conjectural, as urged by the Petitioners.

7. Whether the Court of Appeals correctly interpreted the laws of Nebraska and applied those laws of Nebraska to the facts of the case in accordance with the mandate of the Court to the Court of Appeals.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

25 U.S.C. 194, Section 22 of the Indian Non-intercourse Act of 1834, is as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

STATEMENT OF FACT

INTRODUCTION

For the second time, Petitioners Wilson, *et al.*,[1] RGP, Inc., *et al.*,[2] and the State of Iowa[3] seek to have the Court review questions stemming from disputes that have arisen between the Omaha Indian Tribe and the Petitioners over 2900 acres of land, referred to as the Blackbird Bend Area, situated in the State of Iowa. That controversy gave rise to the Court's Opinion of June 20, 1979, *Wilson* v. *Omaha Indian Tribe.*[4]

Petitioners Wilson, *et al.*, again request the Court to void as unconstitutional the congressional enactment 25 U.S.C. 194.[5] That section reads as follows:

> "§ 194. Trial of right of property; burden of proof
>
> "In all trials about the right of property in which an Indian may be a party on one side, and a white

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[1] No. 79-1741, Wilson, *et al.*, Petitioners v. Omaha Indian Tribe, Respondents.

[2] No. 79-1744, RGP, Inc., *et al.*, Petitioners v. Omaha Indian Tribe, Respondents.

[3] No. 79-1779, State of Iowa, *et al.*, Petitioners v. Omaha Indian Tribe, Respondents.

[4] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 2, *et seq.*, Wilson v. Omaha Indian Tribe, *et al.*, 442 U.S. 653, *et seq.* (1979).

[5] Pet. Wilson, *et al.*, No. 79-1741, pp. 4-5, para. 4: "Whether Title 25 U.S. Code § 194, putting the burden of proof on 'the white person' in a suit by 'an Indian', is unconstitutional because it is invidious racial discrimination in favor of Indians and Indian tribes against all other races and deprives petitioners of their property and of the equal protection of the law in violation of the due process clause of the Fifth Amendment."

> person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Petitioners RGP, Inc., *et al.*, do not now assert the unconstitutionality of 25 U.S.C. 194 on its face. Rather, they assert that the Court and the Court of Appeals have construed 25 U.S.C. 194 in a manner which (a) deprives Petitioners of their property without due process of law; (b) creates ". . . an irrational racial classification . . ." which violates the Fifth Amendment; and (c) asserts that the Court of Appeals erred in its construction of 25 U.S.C. 194 ". . . by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process. . . ." [6]

Additionally, Petitioners RGP, Inc., *et al.*, are sharply critical of the Court of Appeals for allegedly having failed to consider the constitutionality of 25 U.S.C. 194. The circumstances giving rise to that contention follow.

A. The Court's June 20, 1979 Opinion—Its Remand

On June 20, 1979, the Court entered its decision in *Wilson* v. *Omaha.*[7]

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[6] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 3, "Question Presented For Review":

> "Whether the Eighth Circuit Court of Appeals erred in its construction of 25 U.S.C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process; whether 25 U.S.C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution."

[7] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 2, *et seq.*, Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979).

In detail, the Court construed and applied the provisions of 25 U.S.C. 194 as it related to the controversy between the Omaha Indian Tribe and the Petitioners over the 2900 acres constituting the Blackbird Bend Area.[8]

Having construed and applied 25 U.S.C. 194, the Court declared that federal law is controlling in regard to the issues before it and borrowed the law of the State of Nebraska as it related to those issues.[9]

Because the Court of Appeals ". . . did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case," the Court entered this mandate:

> ". . . we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion." [10]

The Court of Appeals acted in strict conformity with the mandate from the Court rendering its opinion after an exhaustive analysis of the Nebraska law respecting accretions and avulsions as they relate to the issues reviewed in *Wilson* v. *Omaha Indian Tribe.*[11]

B. Petitioners RGP, Inc., *et al.*, Contend That The Court's June 20, 1979 Opinion Was Modified By The Subsequent Order Entered June 25, 1979, Granting Those Petitioners A Writ Of Certiorari

Petitioners RGP, Inc., *et al.*, contend that the Court's Order in No. *78-162*, entered June 25, 1979, granting

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[8] *Ibid.*, at p. 10; 442 U.S. 653, 663, *et seq.* (1979).

[9] *Ibid.*, at pp. 17, *et seq.*, III.A.B.C.; 442 U.S. 653, 669, *et seq.* (1979).

[10] *Ibid.*, at p. 28, IV; 442 U.S. 653, 678-79 (1979).

[11] App. Pet., Wilson, *et al.*, No. 79-1741, p. 31; Omaha Indian Tribe v. Wilson, *et al.*, 614 F.2d 1153, *et seq.* (CA 8, 1980).

their petition for a writ of certiorari, resulted in a modification of the remand to the Court of Appeals, which was contained in this Court's Opinion in *Wilson* v. *Omaha*.[12] That modification, asserts RGP, Inc., *et al.*, required the Court of Appeals to render its opinion as to the constitutionality of 25 U.S.C. 194 predicated upon this question presented to the Court by those Petitioners in No. *78-162*:

> "Whether 25 U.S.C. § 194 is unconstitutional on its face and as construed and applied by the United States Court of Appeals for the Eighth Circuit because it constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment to the Constitution." [13]

The Court of Appeals' Opinion is strictly limited to ". . . the law of the State of Nebraska" respecting accretions and avulsions.[14]

Petitioners RGP, Inc., *et al.*, in their present Petition, complain:

> "The . . . Court of Appeals in its opinion filed January 15, 1980 gave *no* consideration to the question of the constitutionality of 25 U.S.C. § 194. . . ." [15]

Those Petitioners then add this statement:

> ". . . even though this Court has heretofore granted the Petition for Writ of Certiorari to these petitioners for the purpose of testing the constitutionality

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[12] *Ibid.*, at p. 28, IV; 442 U.S. 653, 678-79 (1979).

[13] Pet. RGP, Inc., *et al.*, No. *78-162*, "Question Presented For Review," p. 2.

[14] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 34; Omaha Indian Tribe v. Wilson, *et al.*, 614 F.2d 1153, 1155 (CA 8, 1980).

[15] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 4.

> of § 194, *the Court of Appeals has ignored that mandate and refused to consider the various serious constitutional problems presented by the statute as construed.*" [16]

Petitioner RGP, Inc., *et al.*, in their present Petition, No. 79-1744, present this question which is in two parts, which they desire the Court to review:

> "*Whether* the Eighth Circuit Court of Appeals erred in its construction of 25 U.S.C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process;
>
> *whether* 25 U.S.C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution." [17]

Raised by the questions quoted immediately above are issues directly relating to the Opinion of the Court in *Wilson* v. *Omaha Indian Tribe* and the Opinion of the Court of Appeals. Though the charge pertains to the alleged constitutionality of 25 U.S.C. 194, it necessarily involves the rationale of both Courts in construing and applying 25 U.S.C. 194. Throughout the two questions presented here by RGP, Inc., *et al.*, are (a) the issues of the constitutionality of 25 U.S.C. 194, which they seek to raise, with (b) the interpretation and application of the laws of the State of Nebraska respecting accretions and avulsions to the facts of these cases. Those issues are hereafter separately considered.[18]

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[16] *Ibid.*, at p. 5. [Emphasis supplied]

[17] *Ibid.*, "Question Presented For Review," p. 3. [Emphasis supplied]

[18] See, pp. 30, *et seq.*, *infra.*

It is denied, however, that the remand contained in the Court's Opinion of June 20, 1979, was enlarged and drastically modified by its June 25, 1979 Order granting the Petition of RGP, Inc., *et al.*, for a writ of certiorari. Rather, a plain reading of the Order reveals that the writ was granted in conformity with *Wilson, et al.* v. *Omaha Indian Tribe* and not in modification of it.[19]

C. Petitioner State Of Iowa Has Unique Status Here—The Judgment Of The District Court Lacks Finality As To Iowa

The Court declared that 25 U.S.C. 194 does not apply to the State of Iowa.[20] Cognizance was taken of the fact that the Court of Appeals, in its Opinion, did not take into consideration whether the District Court had properly interpreted and applied the laws of the State of Nebraska respecting accretions and avulsions to the facts that were before it. Therefore, the Court declared, that the State of Iowa may offer ". . . evidence to prove its own title or from prevailing on any affirmative defenses it may have."[21] Adhering to that quoted concept, the Court, in its remand to the Court of Appeals, declared:

> ". . . because of its view of the controlling law, the Court of Appeals did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case."[22]

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[19] "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Wilson* v. *Omaha Indian Tribe,* 442 U.S. —— (1979)."

[20] App. to Pet., Wilson, *et al.,* No. 79-1741, pp. 16, *et seq.*; Wilson v. Omaha Indian Tribe, 442 U.S. 653, 669 (1979).

[21] *Ibid.*

[22] *Ibid.*, p. 28, IV; 442 U.S. 653, 679 (1979).

The Court then added:

> "These tasks are still to be performed, and we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion." [23]

In strict conformity with the express language of the Court's remand to it, the Court of Appeals "separately remanded" to the District Court the matter of the claims of the State of Iowa directing that "separate findings" are to be entered by the District Court in accordance with the mandate issued to it.[24]

It is respectfully suggested that both the Court and the Court of Appeals were cognizant of the fact that additional action by the District Court was requisite before there could be finality in the judgment relating to the State of Iowa. Petitioner Iowa very largely adopted the record in the trial court of the other Petitioners. At no time was the property of the State of Iowa separately considered by the District Court. There were no findings of fact, conclusions of law or judgment entered specifically in regard to the State of Iowa at the conclusion of the trial on the merits.[25] The outcome of the remand from the Court of Appeals to the District Court cannot at this time be determined. It is respectfully submitted, in the view of the Tribe, the State's Petition for Certiorari is premature. Until there has been entered a final judgment respecting the State of Iowa, that premature condition will continue to prevail.

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[23] *Ibid.*

[24] *Ibid.*, pp. 47-48; Omaha Indian Tribe v. Wilson, 614 F.2d 1153, 1161 (CA 8, 1980).

[25] App. to Pet., Wilson, *et al.*, No. *78-160*; State of Iowa and State Conservation Commission of the State of Iowa No. *78-161*; App. B, p. 1, Findings of Fact and Conclusions of Law; App. C, Memorandum Opinion of District Court.

D. Petitioners Request The Court To (a) Analyze The Record Of Oral And Documentary Evidence To Determine If The Court Of Appeals Erred In Declaring "clearly erroneous" Crucial Findings Of The District Court; (b) Analyze The Opinion Of The Court Of Appeals To Determine Whether It Erred In Its Interpretation And Application Of The Law Of Nebraska Respecting Accretions And Avulsions

Petitioners Wilson, *et al.*, renewed their request to the Court as to whether the Court of Appeals erred in declaring crucial findings by the District Court as being "clearly erroneous." [26] The Court refrained from reviewing that issue. Rather, it reviewed these questions raised by Petitioners Wilson, *et al.*:

> "In No. 78-160, we granted certiorari on the following questions:
>
> " 'Whether the Eighth Circuit erroneously construed Title 25 U.S. Code § 194 to make it applicable in this case.
>
> " 'Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case.' " [27]

It is suggested that to review the "clearly erroneous" issue, as requested by Petitioners Wilson, *et al.*, at this time, would be a task of the first magnitude. The decision of *Wilson* v. *Omaha* has already determined that the Court of Appeals had correctly construed and applied 25 U.S.C. 194 as it relates to the burden of proof of Petitioners Wilson, *et al.*, and RGP, Inc., *et al.* An analysis of all of the oral and documentary evidence from the trial court would be an unnecessary burden in

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[26] Pet. Wilson, *et al.*, No. *78-160*, p. 5, para. 5.

[27] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 10, note 13; Wilson v. Omaha, 442 U.S. 653, 663-64 (1979).

light of the extended review of that evidence by the Court of Appeals in its original opinion.[28]

E. The Court Is Requested By Petitioners To Review The Nebraska Law And To Apply It To The Facts Of These Cases

Petitioners complain at length that the Court of Appeals has failed correctly to apply the law of the State of Nebraska. Under the heading "Law of Accretion and Avulsion," the Court of Appeals analyzes the subject not only in regard to the federal law and the law of Iowa, but likewise as to the law of Nebraska.[29] With infinite care, the Court of Appeals, in its earlier decision, considered in great detail the oral and documentary evidence comprising the record in the District Court in the trial on the merits. Each of the separate time periods was carefully analyzed and the evidence respecting the movements of the Missouri River was explicitly deter-

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[28] Omaha v. Wilson, 575 F.2d 620, 639, "VI. The 1875-1879 Movement of the Thalweg"; p. 646—"VII. The River Between 1879 and 1912"; p. 647—"VIII. The 1912-1923 Movement of the Thalweg" (CA 8, 1978).

See, also, the Court of Appeals' analysis of "Factual Background," App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 33, *et seq.*

It is respectfully submitted that the appellate court has made a complete and exhaustive review not only of the applicable law, but has applied that law with infinite care to the facts taken by it from both the oral and documentary evidence comprising the record in the trial on the merits in the District Court.

[29] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A25, "V. Law of Accretion and Avulsion." See, in particular, pp. A30-A31, *et seq.*; Omaha v. Wilson, 575 F.2d 620, 633, 635 (CA 8, 1978).

mined predicated upon the record in the case.[30] A more thorough analysis of the trial court's record, than that which was made by the Court of Appeals in its first opinion, is difficult to perceive. It most assuredly demonstrates the lack of merit to the challenge by Petitioners that the Court of Appeals erred when it declared the District Court's findings "clearly erroneous."

In accordance with the Court's mandate, the Court of Appeals again analyzed in depth the trial court's record to the end that it could correctly determine whether, to use the words of the Court,

> ". . . the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case." [31]

In holding that the District Court's interpretation of Nebraska law was incorrect, the Court of Appeals undertook a most comprehensive and complete analysis of all the pertinent cases, including those of the Court and those of the Supreme Court of the State of Nebraska. To be observed is this fact: The analysis of the Court of Appeals and the cases it considered were far more comprehensive than the decisions of the Supreme Court of the State of Nebraska relied upon by the Petitioners in their effort to have the Court again review the issues pertaining to the 2900 acres which comprise the Blackbird Bend Area.

On that background, the facts, as they relate to the decision of the Court of Appeals, will be reviewed.

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[30] Omaha v. Wilson, 575 F.2d 620, at 639—"VI. The 1875-1879 Movement of the Thalweg"; P. 646—"VII. The River Between 1879 and 1912"; p. 647—"VIII. The 1912-1923 Movement of the Thalweg" (CA 8, 1978).

[31] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 28, IV; Wilson v. Omaha, 442 U.S. 653, 679 (1979).

SUMMARY OF ARGUMENT

1. For the second time, the Petitioners return to the Court to have reviewed the decisions of the Court of Appeals for the Eighth Circuit. Both of the Opinions of the Court of Appeals contain in-depth reviews of both the facts and the law that pertain to these cases. (Statement of Fact, pp. 5, *et seq.*)

2. The subject matter or res of these proceedings is the title to 2900 acres of land, referred to as the Blackbird Bend Area situated in the State of Iowa, claimed by the Omaha Indian Tribe as part of its reservation created by the Treaty of 1854 with the United States relative to those lands.

a. The trial court, by its June 5, 1975 Order, maintained the Omaha Indians in possession of the lands in question stating, among other things, that the members of the Tribe have never totally acquiesced in the use of the 2900 acres by the defendants—Petitioners here. The trial court then added:

> ". . . the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years." (Pp. 45-46)

b. The trial court, in its June 5, 1975 Order, likewise ruled:

> ". . . the court views the present occupation by the Omaha Tribe. . . constitutes the status quo to be preserved." (p. 46).

3. The Court, in its June 20, 1979 decision—*Wilson* v. *Omaha*—stated that 25 U.S.C. 194 was enacted by Congress ". . . to protect Indians from claims made by non-Indian squatters on their lands." (p. 45)

4. Petitioners are "squatters" within the purview of 25 U.S.C. 194. Their claims are devoid of patents to the

lands or other indicia of title. Petitioners are trespassers on the 2900 acres, title to which is here involved. (pp. 45, *et seq.*)

5. The Court, in its June 20, 1979 Opinion, specifically ruled respecting the proof by the Omaha Indian Tribe that it had "previous possession" and "ownership" to the 2900 acres comprising the Blackbird Bend Area: "This was enough, it seems to us, to bring § 194 into play." (p. 21) The Court had stated:

> "Section 194 is triggered once the Tribe makes out a prima facie case. . . ." (p. 22).

6. The Omaha Indian Tribe, having "triggered," brought into play, § 194—in the words of the Court—Petitioners, without indicia of title, assumed the burden of proving—the impossible—that the 2900 acres were (a) totally obliterated and washed away by the Missouri River and (b) totally replaced by accretions to the Iowa bank. (p. 20)

7. Both the Court and the Court of Appeals, the Tribe having made out its prima case, required the Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*,

> ". . . to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question." (p. 21)

8. Repeatedly, the Court of Appeals declared that the Petitioners offered nonevidentiary, conjectural and speculative testimony and failed to sustain their burden of proving that (a) the 2900 acres, claimed by the Omaha Indian Tribe, were washed away and obliterated by the Missouri River and (b) the 2900 acres were totally and completely replaced by accretions to the Iowa bank. (p. 23)

9. Predicated upon that failure of the Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*, to sustain their burden of proof, the Court of Appeals declared that: ". . . title

to the land in question should be quieted in the Tribe." (pp. 22, *et seq.*)

10. The Court of Appeals, having declared that the Petitioners had failed to sustain their burden of proving that the Tribe had lost its title to the 2900 acres, was criticized by Petitioners in their Petitions alleging that the Court of Appeals failed properly to interpret and apply the laws of Nebraska to these cases, as mandated by the Court. (pp. 29, *et seq.*)

11. Petitioners failed to sustain their burden of proof respecting the crucial elements of accretion as prescribed by the laws of the State of Nebraska: Petitioners failed to prove (a) erosion of one bank of the Missouri River and (b) the replacement of that eroded bank by deposition to the opposite bank of silt and sediment. Petitioners offered testimony on both points, which was rejected by the Court of Appeals because it was conjectural, speculative and comprised of "educated guesses" (pp. 30, *et seq.*)

12. The Court of Appeals correctly declared that identifiable land in place is not an immutable criterion for establishing avlusion under the laws of Nebraska. Rather, the Court of Appeals emphasized the failure of the Petitioners to prove that the lands were eroded away and replaced by accretions to the Iowa bank. (pp. 34-35 & 36 *et seq.*).

13. Failure by Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*, to sustain their burdens of proof and persuasion, resulted in the Court of Appeals correctly directing that judgment be entered for the Tribe. (p. 22) The case of Petitioners State of Iowa, *et al.*, has been remanded to the District Court for further action and there has been no final action taken by the District Court. (pp. 41, *et seq.*)

14. All of the Petitions for Writs of Certiorari, it is respectfully submitted, should be denied.

ARGUMENT

25 U.S.C. 194, THE COURT HAS DECLARED, IS ". . . to protect Indians from claims made by non-Indian-squatters." [32]

The quotation in the heading from the Court's Opinion in *Wilson* v. *Omaha* is most apropos here. Petitioners are indeed "squatters" on Omaha Indian Reservation lands.

Petitioners, being bereft of patents or other ordinary indicia of title, assert their claims to the land in a most unique manner. Answering the complaint of the Omaha Indian Tribe to quiet its title in and to the 2900 acres in question, Petitioners relied upon affirmative defenses in support of their counterclaim. As the Court states, "Both sides seek to quiet title in their names." [33]

Facts alleged by Petitioners in their affirmative defenses bring these cases within the explicit language of 25 U.S.C. 194. That congressional enactment, among other things, provides that:

> ". . . the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of [a] previous possession or [b] ownership."

As part of the endeavor to make out a claim against the Tribe for the lands in question, Petitioners admit that the Omaha Indian Tribe had both previous possession and ownership.

Both Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*, admit that:

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[32] *Ibid.*, at p. 12; 442 U.S. 653, 665 (1979).

[33] *Ibid.*, at p. 6; 442 U.S. 653, 660 (1979).

(1) the 2900 acres comprising the Blackbird Bend Area "existed" in 1867;

(2) the 2900 acres were surveyed in April and May of that year by Barrett on behalf of the United States of America;

(3) the 2900 acres were part of the Omaha Indian Reservation; and

(4) the 2900 acres comprising the Blackbird Bend Area were situated in the State of Nebraska.[34]

Petitioners, as part of their affirmative defenses, likewise assert, in error, that, although the 2900 acres in question existed as part of the Omaha Indian Reservation at one time,

> "All of said land [Blackbird Bend 2900 acres] was erroded away by the action of the Missiour River . . . and ceased to exist at the described location, having been washed down the river." [35]

Additionally, Petitioners asserted in error but could not prove this second aspect of their affirmative defenses:

> "New land was created between the years 1867 and 1943 and by the process of accretion to the left or Iowa bank of the Missouri River, which accretions extended over all of the area of the earth's surface occupied in 1867 by the land described [as the 2900 acres, title to which is the subject matter of these proceedings]. . . ." [36]

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[34] App. on Writ of Certiorari, Wilson, *et al.*, *78-160*, p. 157, para. 7; p. 158, para. 8.

[35] *Ibid.*

[36] *Ibid.*, Petitioners RGP, Inc., *et al.*, No. *78-162*, at pp. 165-66, paras. 7 & 8, interpose substantially the same affirmative defenses to the Complaint of the Tribe as those set forth in

The Petitioners' complaint that 25 U.S.C. 194 places upon them an onerous burden of proof should, it is respectfully submitted, be read in the light of the burden of proof that the Petitioners, perforce, had to assume by reason of their status as "squatters." The Petitioners had no other predicate for claiming title to the lands. Petitioners were forced to assert unsuccessfully—contrary to fact—that the 2900 acres in question constituting Blackbird Bend had been (a) totally obliterated and washed away by the Missouri River and (b) totally replaced by accretions to the Iowa bank. The burden thus assumed by the Petitioners, a burden that they could not sustain, is truly "mind boggling."

Tribe Proved Its Prima Facie Case—It "triggered" 25 U.S.C. 194

Unchallenged by the Petitioners is this unequivocal and undeniable statement by the Court of Appeals:

> "It is undisputed that the 1854 treaty established the Tribe as the legal title holder to the land area, within the Barrett Survey lines. This historical fact shows 'previous possession or ownership' [25 U.S.C. 194] and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants." [37]

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the preceding quotations taken from the Answer and Counterclaim of the Petitioners Wilson, *et al.*, No. *78-160*.

Petitioners State of Iowa, *et al.*, No. *78-161*, p. 154, para. 42, assert, in error, as do the other Petitioners, that: "Land which may at one time have been within the geographical area of the Omaha Indian Reservation or in the past occupied by the Omaha Indians, which is now owned by the State of Iowa, was eroded, washed away and ceased to exist by action of the Missouri River, and the rights of the Plaintiff to said land was extinguished thereby."

[37] App. to Pet., Wilson, *et al.*, No. *78-160*, pp. A21-A22; Omaha v. Wilson, 575 F.2d 620, 631 (CA 8, 1978).

Continuing in regard to the burden of proof of the Petitioners, the Court of Appeals added this crucial statement:

> "Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe. . . ." [38]

Therefore, said the Court of Appeals, notwithstanding the subsequent movement of the thalweg of the Missouri River,

> ". . . *the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question.*" [39]

In affirming the Opinion of the Court of Appeals respecting the application and interpretation of 25 U.S.C. 194, the Court said this in its June 20, 1979 Opinion in *Wilson* v. *Omaha*:

> "There seems to be no question here that the area within the Barrett survey was once riparian land lying on the *west* bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854." [40]

The Court then emphasized:

> "This was enough, it seems to us, to bring § 194 into play." [41]

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[38] *Ibid.*, at p. A25; 575 F.2d 620, 633 (CA 8, 1978).

[39] *Ibid.* [Emphasis added].

[40] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[41] *Ibid.*

Those statements comport fully with the earlier conclusion by the Court that:

> "Section 194 is triggered once the Tribe makes out a prima facie case of prior possession or title to the particular *area* under dispute." [42]

The Court of Appeals, having thus been affirmed by the Court, proceeded to analyze the laws of Nebraska following this initial comment:

> "Generally, the Court sustained our holding that 25 U.S.C. § 194 was applicable and placed both the burden of going forward with the evidence and of persuasion upon the defendants." [43]

Continuing, the Court of Appeals, in its most recent decision, said:

> "We hold that those parties [Petitioners Wilson and RGP, Inc.] failed to sustain the burden of proof placed upon them by 25 U.S.C. § 194 and title to the land in question should be quieted in the Tribe." [44]

There has been a complete failure by Petitioners Wilson, *et al.*, RGP, Inc., *et al.*, and State of Iowa, *et al.*, to take cognizance of the precise and clear rulings by both the Court and the Court of Appeals. Succinctly stated, both Courts have declared that there resided with the Petitioners the burden of proving that the Tribe had, in some manner, lost its "possession and ownership," which all parties concede the Tribe had previously held. Let it be respectfully emphasized that none of the Petitioners undertook to challenge the explicit rulings of both the Courts that the Tribe had established its prima facie case

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[42] *Ibid.*

[43] *Ibid.*, pp. 33-34; Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[44] *Ibid.*, p. 35; 614 F.2d 1153, 1155-56 (CA 8, 1980).

and, in so doing, had moved the burdens of proof and of persuasion to the Petitioners, who failed to sustain their burdens under 25 U.S.C. 194.

FAILURE OF PETITIONERS CORRECTLY TO STATE THE CRUCIAL DECISIONS BY THE COURT OF APPEALS RESPECTING THE DEFICIENCIES IN PETITIONERS' EFFORTS TO PROVE THEIR AFFIRMATIVE DEFENSES [45] OR TO SUSTAIN THE BURDEN OF PROOF STEMMING FROM 25 U.S.C. 194

None of the Petitioners correctly states (a) the rationale of the opinions of the Court of Appeals or (b) the basic decision rendered by it. Rather, Petitioners complain that the Court of Appeals has, in some manner, failed properly to apply the laws of the State of Nebraska respecting accretions and avulsions. Petitioners failed to offer other than conjectural or speculative evidence as to (a) the erroneous allegations that Blackbird Bend was obliterated and (b) the erroneous allegations that the Blackbird Bend Area was replaced by accretions to the Iowa shore.

Seldom has a court made a more thorough and complete review of the oral and documentary evidence comprising the record from the trial court than that which was undertaken and completed by the Court of Appeals in its earlier opinion.[46] This statement is taken from the Court of Appeals:

> "The basic finding essential to the defendant's [Petitioner's] case is the trial court's statement that 'the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land

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[45] See, p. 22, *supra.*

[46] See, pp. 24, *et seq.*, note 50, *infra.*

> . . . by the gradual process of deposition within the Blackbird Bend area. . . .' " [47]

As to that "finding essential" to Petitioners' cases, the Court of Appeals said this:

> "We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence." [48]

Following that crucial rejection of the "finding essential" to the Petitioners, the Court of Appeals reviewed each and every aspect of the evidence introduced into the record by the Petitioners. Repeatedly, the deficiencies of the evidence that Petitioners offered were declared to be conjectural or speculative.[49] Every phase and every facet of the proof required by Petitioners in support of their claims set forth in their affirmative defenses and under 25 U.S.C. 194 were deficient. In every instance, the evidence offered was speculative, conjectural and predicated upon "educated guesses." [50] Reasons for the non-

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[47] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A39, "VI. The 1875-1879 Movement of the Thalweg"; Wilson v. Omaha, 575 F.2d 620, 639 (CA 8, 1978).

[48] *Ibid.*, at A39-A40; 575 F.2d 620, 639 (CA 8, 1978).

[49] *Ibid.*, at A42; 575 F.2d 620, 640 (CA 8, 1978): "Our analysis of the record leads us to conclude that the evidence presented at trial as a matter of law was insufficient to satisfy the defendants' burden of proving by the preponderance of the evidence that erosion and accretion were responsible for the significant shifts of the river between 1875 and 1879."

[50] *Ibid.*, at A39-A40; 575 F.2d 620, 639 (CA 8, 1978); A42; 575 F.2d 620, 640 (CA 8, 1978).

A44; 575 F.2d 620, 641 (CA 8, 1978): Relative to the identifiable land in place, "We find the evidence concerning bar C to be highly conjectural as to whether it formed by accretion or was in fact identifiable land in place."

[Footnote continued on page 25]

[50] [Continued]

A46; 575 F.2d 620, 642 (CA 8, 1978): ". . . any inferences drawn from the alleged land forms exhibits on the 1879 map appear to be highly conjectural. Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility."

A48; 575 F.2d 620, 643 (CA 8, 1978): "Thus, the testimony is inconclusive as to whether the remnant channel was formed by accretion or avulsion since a remnant chute might also have been formed after the thalweg suddenly and perceptibly moved."

A49; 575 F.2d 620, 643 (CA 8, 1978): "None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstance shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion."

A49; 575 F.2d 620, 643 (CA 8, 1978): ". . . as we have discussed the actual surface positioning of those bars based on the 1879 map is conjectural since the contours were drawn at the high water stage which existed at that time."

A55; 575 F.2d 620, 646 (CA 8, 1978): "Based on the foregoing analysis we find the factual predicate . . . is in large part conjectural and the opinions drawn therefrom must be viewed as speculative."

A56; 575 F.2d 620, 646 (CA 8, 1978): The Court of Appeals succinctly disposed of the trial court's findings as proposed by the Petitioners here in these words: "The trial court felt these facts 'simply [show] the normal and logical progression of the accretion which was shown to be forming in 1879. . . .' 433 F.Supp. at 79. There exists no factual predicate whatsoever to support this conclusion."

A59; 575 F.2d 620, 648 (CA 8, 1978): "In reviewing the record, we cannot but echo the words . . . that it is again only an 'educated guess' as to just how the river moved. The extremely speculative assessment of the reasons for the river's movement offered by the defendants is not sufficient to sustain their burden of proof."

[Footnote continued on page 26]

evidentiary character of the testimony of Petitioners' witnesses stems from these irrefutable facts:

1. In the words of the Court, the Blackbird Bend Area of the Omaha Indian Reservation

> ". . . was long occupied by the Tribe as part of the [Omaha Indian] reservation set apart for it in consequence of the treaty of 1854." [51]

2. Though Petitioners' entire case turned upon the alleged obliteration of the Blackbird Bend Area, their witnesses did not and could not prove that the land had indeed been washed away.[52] Every exhibit offered into the record disclosed that the Blackbird Bend Area had *not* been obliterated and washed

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[50] [Continued]

A62; 575 F.2d 620, 649 (CA 8, 1978): "We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194."

A63; 575 F.2d 620, 650 (CA 8, 1978): "While reasoned deductions may be made from probative facts, the ultimate conclusion may not rest on mere guesswork."

A65; 575 F.2d 620, 650 (CA 8, 1978): "We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map."

A65; 575 F.2d 620, 650-51 (CA 8, 1978): ". . . we hold the defendants' case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194."

[51] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 669 (1979).

[52] App. to Pet., Wilson, *et al.*, No. *78-160*, pp. A10-A12, Plates I, II, III, IV; 575 F.2d 620, 625-27 (CA 8, 1978).

away as testified to by Petitioners' witnesses. Hence, their testimony was nonevidentiary by reason of the conjecture and speculative nature of the opinions rendered by the experts, all as reviewed in specific detail by the Court of Appeals.[53]

3. Having failed to prove that the Blackbird Bend Area was obliterated, it follows *a fortiori* that the Petitioners must necessarily fail in their assertion that the land was replaced by accretions.

4. Moreover, by "substantial conflicting evidence" offered into the record by the Tribe, it is beyond question that there were no accretions to the Iowa bank which could have replaced the Blackbird Bend Area.[54]

It was admitted by a principal witness of the Petitioners, Dr. Hallberg, that he could not testify relative to the alleged "obliteration" of the Blackbird Bend. Rather, with candor, he admitted that his testimony ". . . is indeed an educated guess. . . ." [55]

As the Court of Appeals pointed out in its most recent decision:

> "Evidence of river movement in the critical periods too often gives no more than a basis for an 'educated guess,' in the words of defendants' expert witness, Dr. George Hallberg." [56]

The Petitioners' principal witness Dr. Kennedy perhaps lacked the candor of Petitioners' witness Dr. Hall-

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[53] See, pp. 24-26, note 50, *supra.*

[54] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A24; 575 F.2d 620, 633, note 22 and documentation (CA 8, 1978).

[55] App. on Writ of Certiorari * * * Wilson, *et al.*, No. *78-160*; State of Iowa, *et al.*, No. *78-161*, p. 242.

[56] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 46; 614 F.2d 1153, 1161 (CA 8, 1980).

berg. He nevertheless admitted that he was unable to testify with specificity in regard to accretions to the Iowa bank. Indeed, Dr. Kennedy did not know whether there were accretions to the Iowa bank. This is Dr. Kennedy's statement:

> "I cannot say specifically that they were merged [alleged accretions] together here or at this point or at some other point. All I can say is I would *expect* as rivers normally behave for this to be an area of deposition, and deposition would occur *preferentially* along the Iowa bank." [57]

The Appellate Court recognized that "expectations" and "preferences" do not constitute evidence. As a consequence, the Court of Appeals repeatedly rejected, as speculative and conjectural, the opinion evidence of Petitioners' principal witnesses.

Reference will now be made to the complaints of Petitioners respecting the Opinion of January 15, 1980, rendered by the Court of Appeals.

On the background of the all-encompassing failures by Petitioners to sustain the burden of proof undertaken by them in their affirmative defenses and that which stems from 25 U.S.C. 194, Petitioners complain that there was not adherence to the laws of the State of Nebraska by the Court of Appeals.

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[57] App. on Writ of Certiorari * * * Wilson, *et al.*, No. *78-160*; Iowa, *et al.*, No. *78-161*, pp. 255-56. [Emphasis supplied]

COURT OF APPEALS STRICTLY AND CORRECTLY APPLIED NEBRASKA LAW AS MANDATED BY THE COURT—PETITIONERS FAILED TO OVERCOME THE BASIC ISSUE CONFRONTING THEM: THEIR SELF-DEFEATING, SPECULATIVE, CONJECTURAL NONEVIDENTIARY TESTIMONY AND DOCUMENTS

Petitioners Wilson, *et al.*,[58] RGP, Inc., *et al.*,[59] and the State of Iowa, *et al.*, complain about the decision rendered by the Court of Appeals. It will be observed that the Petitioners all variously assert that the Court of Appeals did not apply the law of Nebraska respecting accretions and avulsion as the Petitioners perceive those laws to be. What the Petitioners did not do—perhaps would not do—is to admit that their problems stem not from the interpretation of the laws of Nebraska, as expressed by the Court of Appeals, but rather their problems stem from the deficiencies of the evidence that they offered in support of their affirmative defenses and the

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[58] Pet. Wilson, *et al.*, No. 79-1741, "Questions Presented For Review," p. 4:

> "1. Whether the Court of Appeals erred in holding that the District Court did not correctly interpret the Nebraska law of accretion and avulsion.
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> "2. Whether the Court of Appeals erred in holding that the District Court did not properly apply the Nebraska law of accretion and avulsion to the facts of this case."

[59] Pet. RGP, Inc., *et al.*, No. 79-1744, "Question Presented For Review," p. 3:

> "Whether the Eighth Circuit Court of Appeals erred in its construction of 25 U.S.C. § 194 by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process. . . ."

burden of proof required by 25 U.S.C. 194, the effect of which, in the words of the Court, was ". . . triggered once the Tribe makes out a prima facie case of prior possession or title to the . . . ." Blackbird Bend Area.[60] That failure, which resulted in the Court of Appeals declaring "clearly erroneous" the crucial findings of the District Court, is inextricably interrelated to Petitioners' complaints against the Appellate Court's decision respecting the laws of the State of Nebraska.

FAILURE OF PETITIONERS TO SUSTAIN THEIR BURDEN OF PROOF STRIPS ALL MERIT FROM THEIR COMPLAINTS AGAINST THE OPINION OF THE COURT OF APPEALS[61]

A vast preponderance of the issues raised by Petitioners is irrelevant. What is crucial but not discussed by Petitioners is Petitioners' failure to prove accretions to the Iowa bank in conformity with the laws in general and the law of Nebraska in particular. Succinctly and correctly, the Court of Appeals defined accretions within the contemplation of the law of Nebraska as follows:

> "As Nebraska case law makes clear, this basic statement of accretive change in the Missouri River has two elements. First, a boundary changes *only where the River's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediment on the other—the land between the old and new channels must be completely disintegrated.*" [62]

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[60] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 652, 668 (1979).

[61] See, pp. 23, *et seq.*, *supra.*

[62] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 38-39; Wilson v. Omaha, 614 F.2d 1153, 1158 (CA 8, 1980). [Emphasis supplied]

An abundance of authority supports that basic proposition of Nebraska law defining accretions.[63] Thus it was that the Petitioners were required to prove that the Missouri River eroded in a westerly direction destroying the right, west or Nebraska bank of the River in its course around Blackbird Bend.[64] Additionally, to prove accretions pursuant to the laws of the State of Nebraska, the Petitioners were required to prove—and they failed to do so—that the Nebraska, west or right bank of the Missouri River had been completely replaced by silt and deposition attaching to the easterly high bank, which is the left or Iowa bank of the stream. There is not a scintilla of evidence in the record to support accretions to that bank. Indeed, the Tribe proved by substantial evidence that there were no accretions to the Iowa bank.[65]

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[63] Jones v. Schmidt, 170 Neb. 351, 102 N.W.2d 640 (1960); State v. Eckland, 147 Neb. 508, 23 N.W.2d 782, 789-90 (1946); Mercurio v. Duncan, 131 Neb. 767, 269 N.W. 901 (1936); Commissioner of Land Office v. United States, 270 Fed. 110, 113 (CA 8, 1920).

[64] See, Plate I, Sketch of River's position in approximately 1875, showing 1852 Anderson and 1867 Barrett survey meander lines; App. to Pet., Wilson, *et al.*, No. *78-160*, p. A10; Omaha v. Wilson, 575 F.2d 620, 625 (CA 8, 1978).

It will be observed that accretions had proceeded eastward to the easterly high bank, as designated on that Plate. It will likewise be observed that the bed of the River was 800 feet in width in 1875 and was 800 feet in width subsequent to the flooding. App. to Pet., Wilson, *et al.*, No. *78-160*, pp. A8, A45; Omaha v. Wilson, 575 F.2d 620, 624, 642 (CA 8, 1978).

[65] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A24, note 22; 575 F.2d 620, 633 (CA 8, 1978): "The Tribe having presented substantial conflicting evidence on the issue of accretion, any presumption of accretion disappeared and had no further effect on their case."

Having failed to prove obliteration of the 2900 acres of Blackbird Bend and the replacement of it by accretions to the Iowa, left or eastern bank of the Missouri River, the Petitioners failed to sustain their burden of proof either under their affirmative defenses [66] or pursuant to 25 U.S.C. 194. On the subject, the Court of Appeals, in its earlier decision, said this:

> "It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows 'previous possession or ownership' and is sufficient to raise a presumption of title in the Tribe under the statute and place the burden of proof on the defendants." [67]

Having again reviewed the issue of the failure of the Petitioners to sustain their burden of proof, the Court of Appeals emphasized that the only evidence offered by Petitioners Wilson, *et al.*, and RGP, Inc., *et al.*,

> ". . . demonstrated only speculative and conjectural evidence of their right to have title to the reservation land, which was granted to the Tribe by the Treaty of 1854, quieted in them. We hold that those parties failed to sustain the burden of proof placed upon them by 25 U.S.C. § 194 and title to the land in question should be quieted in the Tribe." [68]

Petitioners have assiduously refrained from admitting the main thrust and rationale of the most recent opinion of the Court of Appeals, which they request the Court to review. Rather, they discuss elements of the Opinion

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[66] See, pp. 23, *et seq., supra.*

[67] App. to Pet., Wilson, *et al.*, No. *78-160,* pp. A21-A22; Omaha v. Wilson, 575 F.2d 620, 631 (CA 8, 1978).

[68] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 35; Omaha v. Wilson, 614 F.2d 1153, 1155-56 (CA 8, 1980).

of the Court of Appeals which are, under the factual statement here, largely irrelevant.

Petitioners, in their extensive review of the rapidity with which accretions may transpire, totally overlook the crux of the opinions of the Court of Appeals.[69] Their statements on the question of the rapidity with which accretions may take place are in complete accord with the opinions of the Court of Appeals.[70] However, the issue of the rapidity of accretions has no relevancy here. Rather, Petitioners failed to prove accretions—rapid or otherwise—within the purview of the law of Nebraska on the subject.[71]

Contrasts between accretions and avulsions comprise most of the Petitioners' statements to the Court.[72] Petitioners cite virtually identically the same cases as those relied upon by the Court of Appeals. Petitioners' problems, however, are not overcome by extended citations. Their problem, as emphasized throughout, is their failure to prove accretions and erosions requisite to sustain their affirmative defenses and to fulfill their obligations under 25 U.S.C. 194. Petitioners' citations do not change the fact that the expert opinions of Petitioners were speculative and conjectural by reason of the failure to offer a factual predicate upon which those opinions would be

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[69] Pet. Wilson, *et al.*, No. 79-1741, p. 14, 1.A; Pet. State of Iowa, *et al.*, No. 79-1779, pp. 13, *et seq.*

[70] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 38, *et seq.*; Omaha v. Wilson, 614 F.2d 1153, 1158 (CA 8, 1980); Omaha v. Wilson, 575 F.2d 620, 635 (CA 8, 1978).

[71] See, pp. 23, *et seq.*, *supra.*

[72] Pet. Wilson, *et al.*, No. 79-1741, "C," pp. 33, *et seq.*; Pet. RGP, Inc., *et al.*, No. 79-1744, pp. 9, *et seq.*; Pet. State of Iowa, *et al.*, No. 79-1779, pp. 9, *et seq.*

accepted.[73] Those speculative and conjectural opinions resulted in the Court of Appeals declaring repeatedly that the trial court's findings on crucial issues were "clearly erroneous." [74]

IN-DEPTH REVIEW OF NEBRASKA LAW BY COURT OF APPEALS RESULTS IN CORRECT AND EXPLICIT STATEMENTS OF THE LAW OF NEBRASKA PERTAINING TO ACCRETIONS AND AVULSIONS

Petitioners did not say but should have that their problem pertained to their failure to sustain the burden of proof rather than the application of the law by the Court of Appeals.[75] Rather than acknowledging the crucial issue of failure to sustain their burden of proof, the Petitioners attacked the Court of Appeals for its alleged failure to interpret the Nebraska law as the Petitioners would have it.

Main thrust of the earlier opinion of the Court of Appeals, respecting the decision of the District Court, is stated in these terms:

> "We find the district court too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented." [76]

In its recent opinion, which Petitioners request the Court to review, the Court of Appeals reiterates and re-

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[73] See, pp. 23, *et seq., supra.*

[74] See, pp. 23, *et seq., supra.*

[75] See, pp. 23, *et seq., supra.*

[76] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A27; Omaha v. Wilson, 575 F.2d 620, 634 (CA 8, 1978).

affirms its conclusion that the District Court too sharply limits the law of avulsion by constituting identifiable land in place as the immutable criterion for determining the occurrence of an avulsion. On the subject, the Court of Appeals stated:

> "We conclude both Nebraska and federal common law apply the same basic definitions of avulsion and accretion to boundary disputes caused by a river channel change. We hold the district court incorrectly interpreted the Nebraska cases to hold that all river movements, other than those in which intervening land above the high water mark is identifiably in place, are included within the term accretion." [77]

Following that statement, the Court of Appeals alludes to Petitioners' gravest difficulty here—failure to sustain their burden of proof. This sttaement is taken from that opinion by the Court of Appeals:

> "Even assuming the district court properly interpreted Nebraska law, nonetheless our review of the record demonstrates the district court findings are clearly erroneous." [78]

Continuing, the Court of Appeals, paraphrasing its earlier opinion which was predicated upon an infinitely exact and detailed review of the record of the evidence in the trial court,[79] said this:

> "Even if it is assumed that identifiable land in place is the *sine qua non* of avulsive movement, the evidence of identifiable land in place or the lack thereof is simply too inconclusive, too dependent on spec-

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[77] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 45; Omaha v. Wilson, 614 F.2d 1153, 1160 (CA 8, 1980).

[78] *Ibid.*, at p. 46; 614 F.2d 1153, 1160 (CA 8, 1980).

[79] See, pp. 34, *et seq.*, *supra.*

ulation and conjecture, to support the inference of accretive change." [80]

It is believed that successful challenge cannot be interposed to the last-quoted summary of the Court of Appeals. Most assuredly, all of the issues presented here by the Petitioners in regard to the law of the State of Nebraska turn upon the question of whether the Court of Appeals correctly determined that the crucial findings of the trial court were "clearly erroneous." It is believed that the Court, after a comparable, intensive review of the record of the District Court, as was undertaken by the Court of Appeals, would agree with the Court of Appeals in its assessment of the findings which it declared were "clearly erroneous." Having accomplished that intensive assessment of the trial court's record, there is every reasonable prospect that the Court would also agree with the Court of Appeals that it correctly applied the law of Nebraska relative to accretions and avulsions.

Nebraska's Law Does Not Establish Identifiable Land In Place As An Immutable Criterion To Proving An Avulsion

Nebraska's Supreme Court has repeatedly reviewed with great care the principles which pertain to the laws of accretion and avulsion. Those cases were exhaustively analyzed by the Court of Appeals. Comment has already been directed to the principle of law, as enunciated by the Supreme Court of Nebraska, respecting accretions: "Erosion must be shown. . . ." [81] Petitioners failed to prove that erosion. Additionally, Petitioners failed to prove deposition of silt and sediment to the left, east or Iowa bank.[82] Petitioners' problems, stated succinctly, are as

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[80] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 46; Omaha v. Wilson, 614 F.2d 1153, 1160-61 (CA 8, 1980).

[81] See, pp. 30, *et seq.*, *supra.*

[82] See, pp. 30, *et seq.*, *supra.*

follows: The facts are against them; they cannot change those facts. Criticism of the Court of Appeals will not change the facts. That the Missouri River, in relatively short periods of time, drastically, abruptly and completely changed its course is free from doubt.[83] The Missouri River did not erode away the Nebraska or west bank when it made the change. It did not accrete to the Iowa bank when it left its channels. Those are elements required by the laws of Nebraska to be proved by the Petitioners. In *Mitchell* v. *Beerman*,[84] the Nebraska Supreme Court declared that where, as here, accretions are affirmatively pleaded by a defendant, ". . . the burden was on the defendants of proving the accretion by a preponderance of the evidence." [85] Because Petitioners' evidence was nebulous in the extreme, speculative and conjectural, they failed to sustain the burden of proof that Nebraska law says rested with them.

None of the Nebraska decisions, reviewed in detail by the Court of Appeals and the Petitioners, declares that proof of identifiable land in place is an immutable criterion in establishing an avulsion.

Conkey v. *Knudsen* [86] is heavily relied upon by Petitioners. That decision does not support the contentions of Petitioners. The *Conkey* decision cites *Nebraska* v. *Iowa* [87] and declares that when ". . . from any cause [a stream] suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary. . . ." [88] As the Court of Appeals points out:

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[83] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 45-46; Omaha v. Wilson, 614 F.2d 1153, 1160 (CA 8, 1980).

[84] 175 Neb. 616, 122 N.W.2d 525 (1963).

[85] *Ibid.*, at 527.

[86] 143 Neb. 5, 8 N.W.2d 538 (1943).

[87] 143 U.S. 519 (1892).

[88] 143 Neb. 5, 8 N.W.2d 538, 541 (1943).

> "*Conkey* II does mention absence of identifiable land, but nevertheless gives the basic common law definition of avulsion: 'Avulsion is the sudden and rapid change in the course and channel of a river.' " [89]

The *Conkey* decision tends fully to support the concept of the Court of Appeals which, as that Court correctly declares, is that

> ". . . identifiable land in place may have some probative value that erosion [the existence of which is essential to have an accretion under Nebraska law] has not occurred." [90]

It is abundantly manifest that Petitioners not only failed to sustain their burdens of proof by sound evidence, they failed to meet the requirements of the laws of the State of Nebraska in regard to the proof of accretions. Let it be emphasized that it was their burden to prove erosion and acretion—not avulsion.

PETITIONERS' STATEMENTS REQUIRE CORRECTIONS

A. Petitioners Wilson, *et al.*, No. 79-1741

Petitioners Wilson, *et al.*, contrary to fact and without documentation—there is nothing in the record to support the misstatements—state that:

> "The Court of Appeals concedes that there was no identifiable fast land (bank or island) or even *identifiable* riverbed (shore or sandbar) left in place as the thalweg in the Blackbird Bend moved west be-

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[89] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 42; Omaha v. Wilson, 614 F.2d 1153, 1142, note 7, citing Conkey v. Knudsen, 143 Neb. 5, 10, 8 N.W.2d 538, 541 (1943).

[90] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A35; Omaha v. Wilson, 575 F.2d 620, 637 (1978).

> tween 1867 and 1879, or as it moved south from the north high bank between 1906 and 1923 or 1927." [91]

That statement is wholly fabricated. Never did the Court of Appeals make such a statement, much less such a concession. Indeed, the earlier opinion of the Court of Appeals refutes Petitioner Wilson's statement *en toto*. Magnitude of the error in the statement quoted from Petitioners Wilson, *et al.*, is easily demonstrated by reference to the plates set forth in the opinion of the Court of Appeals. Reference in that connection is made to Plate II, "The 1879 Missouri River Commission Survey Map." There, the Missouri River is at flood stage in June, 1879. In discussing Plate II, the Court of Appeals had this to say:

> "At the time the river was shown to be nearly 10,000 feet wide. . . . Soundings taken at that time demonstrate that a substantial land area was immediately below the surface of the flood water." [92]

To be observed from the cited plate is the fact that a large portion of the Blackbird Bend Area was not submerged. That area was covered with heavy tree growth. Far from being destroyed, the area in question was occupied for many years by the Omaha Indian Tribe, a fact taken into consideration by the Court.[93] Petitioners Wilson, *et al.*, throughout the Petition, fail to document most of the statements that are made.

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[91] Pet. Wilson, *et al.*, No. 1741, p. 12.

[92] App. to Pet., Wilson, *et al.*, No. *78-160*, p. 11, Plate II, Court of Appeals' statement at A45; Omaha v. Wilson, 575 620, 626, Court's comment at p. 642 (CA 8, 1978).

[93] "There seems to be no question here that the area within the Barrett survey . . . was long occupied by the Tribe. . . ." App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Omaha v. Wilson, 442 U.S. 653, 669 (1979).

Misstatements by Petitioners Wilson, *et al.*, as to the 1906-1923-1927 period are easily exposed and refuted. Plate III establishes the Barrett Survey of the 2900 acres of land in 1867. Plate IV locates the 2900 acres of land in 1923, after the Missouri River had moved left.[94]

Respecting Petitioners' testimony on the subject of the alleged obliteration of the 2900 acres, the Court of Appeals declared that the testimony could not be accepted as evidence because it comprised an "educated guess" by one of Petitioners' principal witnesses.[95]

B. Petitioners RGP, Inc., *et al.*, No. 79-1744

Reference is also required to statements in the Petition of RGP, Inc., *et al.* Those statements, like the statements by Petitioners Wilson, *et al.*, depart from the facts. Moreover, they have no relationship whatever to the rulings by the Court of Appeals. It is stated, for example, without reference or documentation that:

> "The construction of § 194 by the Court of Appeals, in effect, establishes a *presumption of avulsion* when applied to the movements of the Missouri River over 100 years ago." [96] [Emphasis RGP, Inc.]

Petitioners RGP, Inc., *et al.*, gravely err in making that statement. There is no suggestion by the Court of Appeals; no statement that could reasonably be construed to support the allegation that there is a "presumption" of avulsion. The Tribe respectfully submits, however, that it did prove avulsive movement of the Missouri River.[97]

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[94] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A12; Omaha v. Wilson, 575 F.2d 620, 627 (CA 8, 1978).

[95] *Ibid.*, at p. A59; 575 F.2d 620, 648 (CA 8, 1978).

[96] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 14.

[97] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 45-46; Omaha v. Wilson, 614 F.2d 1153, 1160 (CA 8, 1980).

The same statement is contained in the earlier part of RGP's Petition, where it is stated:

> "Even the Eighth Circuit Court of Appeals acknowledges that the presumption, as applied to this case, becomes irrebutable and conclusive as against these petitioners, thereby denying them the fair opportunity to repel it." [98]

Let it be respectfully submitted that, at no time, did the Court of Appeals even suggest that there was a presumption of any kind involving the Petitioners, much less an "irrebutable and conclusive" presumption.[99]

The Tribe views as unfortunate the statements made. The Court of Appeals adhered to the law throughout and at no time is it suggested by the Court of Appeals that there are "presumptions" against the Petitioners.

C. Petitioners State of Iowa, *et al.*, No. 79-1779

A final judgment has not been entered in the District Court respecting the claims of Petitioners State of Iowa, *et al.*[100] As suggested above, Iowa's Petition is premature.

Reference, nevertheless, will be made to the several questions presented by Petitioners Iowa, *et al.* It is urged there that the Court of Appeals' Opinion is inconsistent with the Court's mandate in *Wilson* v. *Omaha.* Yet, Iowa fails to document or, indeed, to specify the alleged inconsistencies.[101] Iowa urges, contrary to the fact, that

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[98] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 6.

[99] *Ibid.*

[100] See, pp. 10, *et seq.*, *supra.* App. to Pet., Wilson, *et al.*, No. 79-1741, p. 47; Omaha v. Wilson, 614 F.2d 1133, 1161 (CA 8, 1980).

[101] Pet. State of Iowa, *et al.*, No. 79-1779, p. 9.

the Court of Appeals declared that Nebraska law ". . . was identical to the federal rule." [102] What the Court of Appeals stated is that those laws "do not differ substantially" and proceeded fully to document that conclusion.[103] The State of Iowa fails to take cognizance of the main thrust of the opinion of the Court of Appeals. Not mentioned is the failure of Petitioners to sustain their burden of proving their affirmative defenses or to meet the requirements of 25 U.S.C. 194.[104] There, it will be observed that the State counterclaimed asserting that the Blackbird Bend Area had been completely obliterated and washed away. There is no merit to that contention.[105]

Though Petitioners Iowa, *et al.*, assert that the Court of Appeals departed from Nebraska law, they do not document where or to what extent that departure exists. Hence, the charges remain purely speculative and generalized.[106]

Entirely overlooked by the Petitioners Iowa, *et al.*, is that the Court, in *Wilson* v. *Omaha*, affirmed the Court of Appeals in its holding that the Tribe, when it proves its *prima facie* case, by proof of both "previous possession" and "ownership," establishes a "presumption of title," pursuant to 25 U.S.C. 194. After those circumstances, the burden of proof moved to Petitioners and they failed to sustain that burden.[107]

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[102] *Ibid.*, p. 10.

[103] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 36, *et seq.*; Omaha v. Wilson, 614 F.2d 1153, 1156, *et seq.* (CA 8, 1980).

[104] See, pp. 19-20, note 36, *supra.*

[105] See, pp. 19-20, note 36; pp. 22, *et seq.*, p. 24, note 50, *supra.*

[106] Pet. State of Iowa, *et al.*, No. 79-1779, pp. 14, *et seq.*

[107] App. to Pet., Wilson, No. 17-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

Charges by Petitioners State of Iowa, *et al.*, that the Court of Apepals has not shown due "deference" to the laws of the State of Nebraska simply is without merit. Quite clearly, the Petitioners State of Iowa, *et al.*, have not considered the in-depth analysis of the laws of the State of Nebraska in the first opinion of the Court of Appeals or its most recent decision.[108]

The State of Iowa suggests that the Court should "exercise supervisory jurisdiction" over the Court of Appeals. In response to that, the Tribe points out that the Court has exercised that jurisdiction and there has been full compliance with the mandate of the Court by the Court of Appeals.

Finally, it is asserted that the decision of the Court of Appeals will, in some manner, adversely affect the subsequent decisions involving the same subject matter. Once again, reference is made to the fact that Iowa's judgment is not yet final. However, the point that it raises is lacking in merit by reason of the great care with which the Court of Appeals rendered its opinion. It is again respectfully emphasized that the Petitioners State of Iowa, *et al.*, and the other Petitioners have failed to take cognizance of the main thrust of the Court's opinion and that of the Court of Appeals: The obligation of the Petitioners to sustain their burden of proof which, as the Court of Appeals on two occasions has declared, they have failed to do.

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[108] App. to Pet., Wilson, *et al.*, No. *78-160*, p. A31, see notes 30, *et seq.*; Omaha v. Wilson, 575 F.2d 620, 636, *et seq.* (CA 8, 1978). See the comprehensive analysis of "Nebraska Case Law" in the most recent opinion of the Court of Appeals, App. to Pet., Wilson, *et al.*, No. 79-1741, p. 36, Wilson v. Omaha, 614 F.2d 1153, 1156, *et seq.* (CA 8, 1980).

As construed and applied by the Court[109] and the Court of Appeals,[110] the constitutionality of 25 U.S.C. 194 is manifest. Petitioners, in their early request to the Court to review the issues, raised the question of the constitutionality of 25 U.S.C. 194.[111] This Court refrained from considering the question of the constitutionality of the provision. In explicit detail, the history of 25 U.S.C. 194 was reviewed by the Court.[112] It is implicit in the decision rendered by the Court that 25 U.S.C. 194 was an appropriate exercise by Congress of its constitutional and plenary power over Indian affairs. Repeatedly, the Court has recognized and upheld that power in Congress. It has acted to provide means which fulfill the "compelling governmental interest" to protect Indians in their ownership and possession. Quite obviously, 25 U.S.C. 194, as applied by the Court, comes within the purview of that concept. In *Oneida Indian Nation* v. *County of Oneida*,[113] the Court refers to the "almost countless cases" recognizing the primacy of federal law where Indian interests are involved and upholding the power of Congress to enact legislation of the character here involved.

Rationale of the Court's Opinion and the concepts there enunciated are in keeping with its earlier decisions.[114]

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[109] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 10, *et seq.*, pp. 16, *et seq.*; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[110] *Ibid.*, at p. 33; Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[111] See, pp. 5, *et seq.*, *supra.*

[112] App. to Pet., Wilson, *et al.*, No. 79-1741, II, pp. 10, *et seq.*, see, in particular, pp. 16, *et seq.*; Wilson v. Omaha, 442 U.S. 653, 664, particularly pp. 668-69 (1979).

[113] 414 U.S. 661, 667, 669 (1974).

[114] See, Worcester v. Georgia, 31 U.S. 515, 556 (1832); United States v. Santa Fe Pacific RR Co., 314 U.S. 339, 345,

D. Misstatements By Petitioners Relative To Claimed Title And Occupancy

Petitioners come within the purview of the objectives for which 25 U.S.C. 194 was enacted:

> "[The Court declared that it was] . . . to protect Indians from claims made by non-Indian squatters on their lands." [115]

It has been emphasized that Petitioners have no indicia of title—no patents.[116] Petitioners are "squatters." Whatever paper interests Petitioners may have is derived from "squatters" on the lands of the Omaha Indian Tribe.

Indeed, as the trial court so succinctly stated, relative to the non-title status of the Petitioners "squatters,"

> ". . . the Monona County Assessor apparently felt unsure enough of the status of title to omit these lands from the tax rolls for many years." [117]

Petitioners or the "squatters," to whom they relate their claims, first squatted on the 2900 acres, title to which is the subject matter of these cases, in the 1940s. Most assuredly, there is no merit in the statement by Petitioners RGP, Inc., *et al.*, when they assert that they ". . . have farmed the property in dispute since the early

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347 (1941); Morton v. Mancari, 417 U.S. 535, 547, *et seq.* (1974); McClanahan v. Arizona, 411 U.S. 164, 174 (1973); Squire v. Capoeman, 351 U.S. 1, 6-7 (1956); United States v. Rickert, 188 U.S. 432, 442-43 (1903).

[115] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 12; Wilson v. Omaha, 442 U.S. 653, 665 (1979).

[116] See, pp. 18, *et seq., supra.*

[117] App. on Writ of Certiorari, Wilson, *et al.*, No. *78-160*; State of Iowa, *et al.*, No. *78-161*, Order filed June 5, 1975, United States District Court, p. 119 at p. 124.

1900's." [118] There is no agreement as to the exact time when Petitioners commenced their trespass upon the lands of the Omaha Indian Tribe. Petitioners State of Iowa, *et al.*, declare it was 1912.[119] Petitioners Wilson, *et al.*, acknowledge that the Tribe was in possession at least until 1927.[120] It is clear that Petitioners do not agree when they first "squatted" on tribal land. Far more important is the fact that Petitioners' trespasses upon the 2900 acres of Indian land caused the Omaha Indian Tribe irreparable and continuing damage.

Additionally on the position of the dubious character of Petitioners' claims, further reference is made to the June 5, 1975 Order, entered by the trial court. That court likewise recognized that ". . . the members of the Tribe have never totally acquiesced in defendants' [Petitioners'] use of the land. . . ." [121] The court then added:

> "Perhaps the true uncontested status was many years ago before the Missouri River changed its course. . . . the court views the present occupation by the Omaha Tribe . . . constitutes the status quo to be preserved." [122]

It is abundantly manifest that the complaints of Petitioners RGP, Inc., *et al.*, and others that the opinions of the Court and of the Court of Appeals do them an injustice are without merit. Rather, the Omaha Indian Tribe has suffered greatly from the trespasses by Petitioners, who have benefitted greatly by their agribusiness.

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[118] Pet. RGP, Inc., *et al.*, No. 79-1744, p. 13.

[119] Pet. State of Iowa, *et al.*, No. 79-1779, p. 5.

[120] Pet. Wilson, *et al.*, No. 79-1741, p. 33.

[121] App. on Writ of Certiorari, Wilson, *et al.*, No. *78-160*; State of Iowa, *et al.*, No. *78-161*, Order filed June 5, 1975, United States District Court, p. 119 at p. 124.

[122] *Ibid.*

THE COURT [123] AND THE COURT OF APPEALS [124] CORRECTLY CONSTRUED AND APPLIED 25 U.S.C. 194 AS A PROPER EXERCISE BY CONGRESS OF ITS PLENARY POWER OVER INDIAN AFFAIRS

The Court's review, analysis, interpretation and application of 25 U.S.C. 194 strongly buttresses the explicit decision of the Court of Appeals that the Act in question came within the purview of the plenary powers of Congress over Indian affairs, as delegated to the Legislative Branch by the Constitution.

Reference has been made above to the fact that writs of certiorari were not granted in regard to the constitutional questions originally presented by the Petitioners to the Court for review.[125] Limited character of the review, giving rise to *Wilson* v. *Omaha*, is stated by the Court in these terms:

> "We granted separate petitions for certiorari filed by the State of Iowa in No. 78-161 and by the individual petitioners in No. 78-160, but limited to the questions whether 25 U.S.C. § 194 is applicable in the circumstances of this case, in particular with respect to the State of Iowa, and whether federal or state law governs the substantive aspects of these cases." [126]

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[123] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 10, *et seq.*, see, in particular, pp. 16, *et seq.*; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

[124] App. to Pet., Wilson, *et al.*, No. *78-160*, at pp. A15, *et seq.*; Wilson v. Omaha, 575 F.2d 620, 629, *et seq.* (CA 8, 1978); App. to Pet., Wilson, *et al.*, No. 79-1741, p. 33; Omaha v. Wilson, 614 F.2d 1153, 1155 (CA 8, 1980).

[125] See, pp. 5, *et seq.*, *supra.*

[126] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 9-10; Wilson v. Omaha, 442 U.S. 653, 663 (1979).

The Court, the Tribe believes, was not unmindful that the constitutionality of 25 U.S.C. 194 had been challenged by all of the Petitioners.[127] Rather than considering the constitutional question, there was apparently adherence by the Court to its basic principles that it ". . . will not decide questions of a constitutional nature unless absolutely necessary to decide the case." [128] Justice Brandeis, in the cited opinion, described that concept to be "a cardinal principle" governing the Court's conduct when the validity of an act of Congress is challenged.[129]

Respect for the Legislative Branch by the Court gave rise to the doctrine of strict necessity—an act of Congress will not be voided as unconstitutional absent evidence that a mistake has been made by the Congress which is sufficiently clear that the issue is not open to rational question.[130] Congress, when it enacted 25 U.S.C. 194, most assuredly made no mistake. Cognizance of that fact was taken by the Court in its opinion.[131]

Petitioners RGP, Inc., *et al.*, in the second half of their question, raise this issue:

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[127] Pet. Wilson, *et al.*, No. *78-160*, p. 4, Question 1; Pet. State of Iowa, *et al.*, No. *78-161*, p. 2, Question 3; Pet. RGP, Inc., *et al.*, No. *78-162*, p. 2, Question Presented For Review. Petitioners RGP, Inc., *et al.*, presented a single question—Whether 25 U.S.C. 194, on its face and as construed, constitutes invidious racial discrimination against Petitioners.

[128] Ashwander v. TVA, 297 U.S. 288, 346-48 (1936).

[129] *Ibid.*

[130] Rescue Army v. Municipal Court, 331 U.S. 549, 571 (1947); Calder v. Bull, 3 U.S. 386, 395, 399 (1798); Flemming v. Nestor, 363 U.S. 603, 611 (1960).

[131] App. to Pet., Wilson, *et al.*, No. 79-1741, pp. 10, *et seq.*, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

> ". . . whether 25 U.S.C. § 194 as construed by the United States Supreme Court and the Eighth Circuit Court of Appeals unconstitutionally creates an irrational racial classification and imposes racial and ethnic burdens and preferences in violation of the Fifth Amendment to the Constitution." [132]

Response to that inquiry by Petitioners RGP, Inc., *et al.*, is stated by the Court in these words:

> "Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these acts as they developed was to protect the rights of Indians to their property." [133]

Continuing, the Court alluded to the scope of the congressional acts to protect the Indian properties:

> "Among other things, [the Act of which 25 U.S.C. 194 is a part] non-Indians were prohibited from settling on tribal properties, and the use of force [by the Executive Branch] was authorized to remove persons who violated these restrictions." [134]

To Petitioners' assertion that the Court of Appeals had erroneously applied 25 U.S.C. 194 to Indian Tribes and not to individual Indians, the Court said this:

> "We think the argument is untenable." [135]

In sustaining the Court of Appeals' opinion upholding 25 U.S.C. 194, the Court rejected the Petitioners' contentions in these words:

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[132] Pet. RGP, Inc., *et al.*, No. 79-1744; p. 3. To be noted is that the second question is not numbered.

[133] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 11; Wilson v. Omaha, 442 U.S. 653, 664 (1979). See, in that regard, 25 U.S.C. 180

[134] *Ibid.*

[135] *Ibid.*, at p. 10; 442 U.S. 653, 668-69 (1979).

> "It stands to reason that in re-enacting this provision . . . Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals." [136]

Responding to Petitioners' defense of the District Court that to apply 25 U.S.C. 194 ". . . involves the issue on which this case turns. . . ." the Court declared:

> "We think the Court of Appeals had the better view of the statute in this regard." [137]

Having reviewed the fact that the Tribe had both "previous possession" and "ownership" under 25 U.S.C. 194, the Court stated:

> "This was eough . . . to bring § 194 into play." [138]

Finally, Petitioners RGP, Inc., *et al.*, raised the question of whether the Court of Appeals erred in its construction of 25 U.S.C. 194

> ". . . by creating a burden of proof which is greater than a preponderance of the evidence and thereby deprived petitioners of their property without due process. . . ." [139]

It is respectfully submitted that the Court of Appeals adhered strictly to this Court's interpretation and application of 25 U.S.C. 194.[140] Petitioners do not establish the basis upon which their contention is presented. Quite obviously, the Court of Appeals did not depart from what the Court said in its Opinion. Rather, as will be observed,

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[136] *Ibid.*, at p. 14; 442 U.S. 653, 667 (1979).

[137] *Ibid.*, at p. 16; 442 U.S. 653, 669 (1979).

[138] *Ibid.*

[139] Pet. RGP, Inc., *et al.*, p. 3.

[140] App. to Pet., Wilson, *et al.*, No. 79-1741, p. 16; Wilson v. Omaha, 442 U.S. 653, 668-69 (1979).

there was strict adherence to it.[141] As this Court emphasized:

> ". . . in view of the evident purpose of the statute and its use of the term 'presumption' which the 'white man' must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian [Petitioners] shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out [as it did] its prima facie case of prior title or possession." [142]

CONCLUSION

Based upon the preceding review of the Petitions for Writs of Certiorari, the Court's Opinion of June 20, 1979, and the Opinions of the Court of Appeals, the Petitioners having been to the Court of Appeals on two previous occasions, it is respectfully submitted that the Petitions for certiorari should be denied.

Respectfully submitted,

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May 1980

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[141] *Ibid.*, at p. 34, "II. Nebraska Law," *et seq.*; Omaha v. Wilson, 614 F.2d 1153, 1155, *et seq.*, (CA 8, 1980).

[142] *Ibid.*, p. 17; Wilson v. Omaha, 442 U.S. 653, 669 (1979). [Emphasis supplied.]